THE FRANCHISES OF TELEPHONE AND TELEGRAPH COMPANIES, LEGISLATIVE, MUNICIPAL AND CONGRESSIONAL.

Primary amongst the questions confronting jurists and legislators of to-day is that concerning the granting of franchises to those creations of the law which owe their inception to the progress of modern scientific invention—telephone and telegraph companies. Although, in a measure, novel in their uses, but few new legal questions have arisen because of their existence, none to the adjudication of which well-settled legal principles have not been sufficient. Very little special legislation, on their behalf, has been enacted, or indeed required. That which has found its way into the statute books of the communities in which such electrical corporations exist has been enacted largely with a view to afford facilities for the better operation of scientific improvements, which are, in their very nature, of inestimable value to the general public. The residue of special enactments of this kind have been found necessary to restrain such corporations from exercising powers that are not essential to their existence and which have proved detrimental to already existing and well-recognized rights.

The granting of franchises is a power that, unfortunately, has not always been exercised with proper caution, though a rigid conservatism in this respect, tending as it would to nullify and defeat the rapid strides of scientific invention and improvement, would undoubtedly prove deplorable, if not actually disastrous. A franchise being "a branch of the sovereign prerogative subsisting in the subject by a grant from the sovereign,"[1] the delegation of such power should be primarily beneficial to the sovereign public, then, to the grantee. Shaw, C. J.,[2] well defines the extent of legislative

[1] 3 Bl. Com. 37; Finch, 164; 3 Cruise Dig. tit. 27, par. 1.
[2] B. & L. R. R. *v.* Salem & L. R. R., 2 Gray, 32.

power in this respect; he says: "In addition to the law-making power, the legislature is the representative of the whole people, with authority to control and regulate public property and public rights, to grant lands and franchises, to stipulate for, purchase and obtain all such property, privileges, easements and improvements as may be necessary or useful to the public, to bind the community by their contracts therefor, and generally to regulate all public rights and interests."

Of greatest moment, in regard to the franchises of telephone and telegraph companies, is their use of the streets, their existence upon the highways. Under the old English common law, the easement in a highway was the property of the king as universal trustee;[3] it consequently, under our form of government, becomes the property of the people, unless otherwise stipulated, may be disposed of by their representatives, and is subject to the absolute control of the legislature. The regulation of the streets is ordinarily given to a municipal corporation for corporate purposes only and is even then subject to the paramount control of the legislature as regards general and more extended uses.[4] The technical fee to the land may remain where it will, either in the adjacent owner or in the public, for as long as the land is preserved as a common highway, the rights of the technical owner are subrogated to the easement to such an extent as to practically cease to exist.[5] To divest itself of the control of the streets, and to vest a municipality with power to grant particular franchises, that in any manner affect the common easement enjoyed by the public, special action by the legislature is necessary and the municipality must be so empowered, expressly, or by direct implication.[6]

The legislative power to grant franchises is, in general, absolute, for, except when prohibited or restricted by the provisions of the state constitution, the legislature is fully empowered to grant all franchises, even if they be exclusive,

[3] 1 Rolle Abr. 392; Goodtitle *v.* Alker, 1 Burr. 143.

[4] Phila. & Trenton R. R., 6 Whart. 25.

[5] Sullivan *v.* R. R. Co., 51 N. J. L. 518; Improvement Co. *v.* Hoboken, 36 N. J. L., 540; R. R. Co. *v.* Newark, 10 N. J. Eq. 352.

[6] Phila. & Trenton R. R. *v.* Hoboken, 35 N. J. L. 208.

within its own jurisdiction.[7] For a municipal corporation to grant exclusive franchises over the streets, it must possess the whole sovereign power and control of the highways, delegated to it by the legislature.[8]

It has been, and is, the practice of telephone and telegraph construction to follow, in so far as possible, the lines of streets and highways, as affording facilities otherwise not obtainable. It is not the purpose of this article to discuss the mooted question of compensation to the abutting owner, but rather the legal necessity of legislative sanction to enable these electrical companies to pursue this course. Jackson, J., says:[9] "It is well settled that the right to use the streets and other public thoroughfares of a city for the purpose of placing therein or thereon pipes, mains, wires and poles for the distribution of gas, water or electric lights, for public or private use, is not an ordinary business in which any one may engage, but is a franchise belonging to the government, the privilege of exercising which can only be granted by the state or by the municipal government of the city acting under legislative authority." This view has led to two very interesting lines of decisions. In the one, it is contended that the legislature stands simply as trustee for the easement of the public in the highway and, as trustee, takes no greater title than is necessary to the proper execution of the trust. Hence it possesses no power to grant franchises to telegraph and telephone companies for the erection and maintenance of poles and wires upon the highways and, though it is tacitly admitted that the granting of franchises to such companies is a proper exercise of legislative authority, the existence of such poles and wires upon the public streets is held to be contingent upon a grant from the abutting owner in whom the fee remains.[10] In the second line

[7] Gibbons *v.* Ogden, 9 Wheat. 1; West River Bridge *v.* Dix *et al.*, 6 How. 507; Shorter *v.* Smith, 9 Ga. 529; New Hampshire Bridge *et al.*, 7 N. H. 35; Cal. Teleg. Co. *v.* Atl. Teleg. Co., 22 Cal. 398; Hazen *v.* Union Bank, 1 Sneed (Tenn.), 115.

[8] Waterworks *v.* Atl. City, 39 N. J. Eq. 367; Grd. Rpds. E. L. & P. Co. *v.* Grd. Rpds. Edison E. L. & F. G. Co., 33 Fed. Rep. 659.

[9] Grd. Rpds., etc., Co. *v.* Grd. Rpds. Ed., etc., Co., 33 Fed. Rep. 659.

[10] Mut. Tel. & Tel. Co. *v.* Colwell Lead Co., 67 How. Pr. 365; B. of T. Tel. Co. *v.* Barnett, 107 Ill. 507; W. U. Tel. Co. *v.* Williams, 86 Va. 696.

of decisions, it is held that the construction of such lines, and their maintenance upon the streets, is a use similar to that for which the highways were acquired and constitute no additional foreign burden upon the fee.[11] Hence the power to erect poles and string wires, provided the public easement in the highway is in nowise obstructed, is held to be a privilege conferred upon telephone and telegraph companies by, and in, the granting of a franchise to them.

As to the construction of franchises granted to telephone and telegraph companies, there can be no question. Every grant of a franchise, or in the nature of a franchise, is to be construed strictly.[12] Nelson, J., in the case of *Minturn* v. *Larne*[13] says: "It is a well-settled rule of construction of grants by the legislature to corporations, whether public or private, that only such powers and rights can be exercised under them as are clearly comprehended within the words of the act, or derived therefrom by necessary implication, regard being had to the objects of the grant. Any ambiguity or doubt arising out of the terms must be resolved in favor of the public." Once granted, however, a franchise assumes the nature of a contract, and the state is bound by the grant of the rights, so conveyed by the legislature, even though they be exclusive, provided they are not in conflict with the constitution.[14]

Whether the grant of a franchise can be resumed, by the legislature, or its substantial advantages impaired, without the consent of the grantees, presents still another interesting question, Van Sycle, J.,[15] considers the power of the legislature, so to resume or impair a franchise, extremely doubtful, and says: "It is in the nature of a contract, and those who procured the passage of the act having entered upon the development of their scheme and made large outlays in its promotion, have acquired rights which

[11] Pierce *v.* Drew, 136 Mass. 75; Boston *v.* Richardson, 13 Allen, 146; Atty. Gen. *v.* Met. R. R., 125 Mass. 515.

[12] U. S. *v.* Arredondo, 6 Pet. 738; Beaty *v.* Knowler, 4 Pet. 168; Providence Bank *v.* Billings, 4 Pet. 514; Charles River Bridge *v.* Warren Bridge, 11 Pet. 420.

[13] 23 How. 436.

[14] Charles River Bridge *v.* Warren Bridge, 7 Pick. 344.

[15] State *v.* Blake *et al.*, 35 N. J. L. 208.

must be regarded." A view that, because of a proper and fitting regard for vested rights, has been very generally taken.[16] So it has been held that a subsequent statute interfering with, restricting, or tending to nullify a previously granted franchise, or the rights thereunder acquired, is, in so far as it so interferes, inoperative and void.[17] And, while the legislature is empowered to exercise the police power of a state, subject to the power of the court to adjudicate the question as to whether any particular enactment is an invasion of the constitutional rights of the individual, it may not, under the guise of protecting public interests, interfere with or restrict private business.[18]

The primary question, in the granting of franchises to telephone and telegraph companies by a municipality, is that concerning the authority of the particular municipal corporation, in question, to make such grants. The question at issue is, necessarily: Has the legislature expressly, or by necessary implication, in the granting of the munipical charter, or by subsequent legislative enactment applicable to such municipality, delegated to it such portion of the legislative authority as is necessary to the lawful exercise of such power?[19] If general control over the streets has been so granted, the municipality clearly may grant franchises for the use of the streets, provided no additional burden is imposed upon the fee.[20] As to the necessary method of action, Van Vleet, V. C., says:[21] "Where no method is prescribed in which a municipality shall exercise its power, but it is left free to determine the manner for itself, it may act either by resolution or by ordinance. One method is just as effectual in point of law as another."[22] In pursuance

[16] Planters' Bank *v.* Sharp., 6 How. 301; People *v.* Manhattan Co., 9 Wend. 351; Bridge Co. *v.* Hoboken Co. 2 Beas. 81.

[17] Dartmouth College *v.* Woodward, 4 Wheat. 518; State Bank of Ohio *v.* Knoop, 16 How. 369; Farrington *v.* Tenn., 95 U. S. 679; Fletcher *v.* Peck., 6 Cranch. 135; Dodge *v.* Woolsey, 18 How. 331.

[18] Lawton *v.* Steele, 152 U. S. 137; Mugler *v.* Kansas, 123 U. S. 623.

[19] 2 Dillon Mun. Corp., par. 680.

[20] Pelton *v.* E. Clev. Ry. Co., 22 Week. L. Bul. 67.

[21] Halsey *v.* R. T. St. Ry. Co., 20 Atl. Rep., 859.

[22] State *v.* Jersey City, 27 N. J. L. 493; Burlington *v.* Dennison, 42 N. J. L. 165; Butler *v.* Passaic, 44 N. J. L. 171.

of such delegated authority, a municipality may grant a franchise that shall be in its nature exclusive, conveying thereunder rights that the city may not subsequently impair nor restrict.[23] Nevertheless, the franchise so granted acquires simply the nature of a contract, and if the telephone or telegraph company erects its poles and wires under authority of an ordinance, which provides for the expiration of its privileges on and after a certain date, such company is possessed of no legal right to maintain such equipment, within the corporate limits, after the life of such grant.[24] So the passage of an ordinance by a municipality, permitting the erection of poles and wires by a telegraph company on conditions of benefit to the city, the acceptance of the ordinance by such company, and the subsequent enjoyment of the benefits by the municipality, constitute all the necessary essentials of an executed contract which the city may not violate.[25]

Telephone and telegraph companies are, however, properly subject to municipal regulation, irrespective of the authority granting the franchises under which they operate. The imposition of suitable conditions, regulations and restrictions, in the form of municipal ordinances, are to be supported as a proper exercise of the police power of a city, provided they do not evidence a desire to oppress, or unwarrantably control the maintenance and operation of telephone and telegraph lines within the city.[26] So an ordinance requiring such electrical companies to place their wires in conduits is a proper exercise of municipal police power;[27] likewise a charge, in the nature of a rental, for the exclusive use of parts of the streets;[28] and a city may lawfully impose a tax upon the poles and wires of telephone, or telegraph companies, maintained within the corporate limits, to cover the

[23] Teachout *v.* Des Moines B. G. R. R. Co., 75 Iowa, 722.

[24] Mut. Un. Tel. *v.* Chicago, 16 Fed. Rep. 309; So. Bel. Telep. Co. *v.* Richmond, 98 Fed. Rep. 671.

[25] St. Louis *v.* W. U. Tel. Co., 63 Fed. Rep. 68; New Orleans *v.* So. T. & T. Co., 40 La Ann. 41; Chicago *v.* Sheldon, 9 Wall. 50; Kentucky *v.* Corrigan, 86 Mo. 67.

[26] Richmond *v.* So. Bell. Telep. Co., 174 U. S. 761.

[27] W. U. Tel. Co. *v.* Mayor, 38 Fed. Rep. 552.

[28] St. Louis *v.* W. U. Tel. Co., 149 U. S. 465.

expense to which the municipality is subjected, in the enforcement of its police regulations, because of the maintenance of such equipment upon the streets of the city;[29] but such tax must be fair and reasonable, and a municipality, in the exercise of its police power, may not impose exorbitant charges, nor seek to derive, from such taxation, revenue, vastly disproportionate to the actual outlay for supervising and inspecting such poles and wires.[30] Indeed, the whole question of the proper municipal regulation of these, and kindred, electrical companies is one of the greatest nicety. On the one hand, we have arrayed the inviolability of existing rights, possessing all the attributes of the consideration of an executed contract, together with the natural desire to promote and facilitate the operations of creatures that so largely tend to improve and widen the scope of business enterprise and social comfort; on the other hand, the necessity for a fitting regard for the safety of the community and for the proper preservation of the rights of its individual members.

The powers of Congress, as to the franchises of telephone and telegraph companies, are those conveyed by the Federal Constitution. Article 1, Section 8, of the Constitution, which confers upon Congress the power to regulate interstate commerce, permits the states to regulate matters of local interest which affect, only incidentally, commerce between the states, but the authority of Congress is universal and exclusive where the matter is characteristically national. If Congress fails to act and provides no law for the regulation of commerce between the states, of that nature which makes congressional jurisdiction exclusive, it thereby indicates its desire that such commerce shall not be the subject of state regulation.[31] So a state will not be permitted to restrict, or impose burdens upon the transmission of messages, by telephone or telegraph companies, from one state to another.[32] Nevertheless, such companies owe obedience to the laws of

[29] Phila. *v.* W. U. Tel. Co., 32 C. C. A. (Pa.) 246.

[30] Phila. *v.* W. U. Tel. Co., 81 Fed. Rep. 948.

[31] Brown *v.* Houston, 114 U. S. 622; Gloucester Ferry Co. *v.* Pa., 114 U. S. 196; Walling *v.* Mich., 116 U. S. 446; Pickard *v.* Pullman So. Car Co., 117 U. S. 34.

[32] Ry. Co. *v.* Ill., 118 U. S. 557.

the state within which they are located and are under obligation to pay their fair share of the taxes necessary for its support, [33] when levied upon their real or personal property within the jurisdiction of the state.[34] Telegraphic and telephonic communication between the states is part of their commercial intercourse and so properly subject to the control of Congress,[35] and state franchises granted to such companies as operate interstate lines are subject to congressional control, in so far as it may be necessary to control them for the regulation of commerce.[36]

Acting upon these premises, Congress, July 24, 1866, passed what is known commonly as the "Telegraph Act." It may be stated, at the outset, that there can be no doubt that telephone, as well as telegraph, companies are included within the provisions of this legislation.[37] The first paragraph of the act, which alone is of importance in this discussion, provides that telegraph companies, organized under the laws of any state, may construct, maintain and operate their lines over any part of the public domain, military or post roads, and under or across any navigable streams of the United States, provided they do not interfere with ordinary travel, or in any way obstruct the same.[38] The court, in the case of the *Pensacola Tel. Co.* v. *West. Union Tel. Co.*,[39] defining the powers acquired under the act, says: "It gives no foreign corporation the right to enter upon private property, without the consent of the owner, and erect the necessary structures for its business; but it does provide that, whenever the consent of the owner is obtained, no state legislation shall prevent the occupation of the post roads for telegraph purposes by such corporations as are willing to avail themselves of its privileges." So a telegraph company may not, relying upon this act, occupy the streets of a city

[33] Teleg. Co. *v.* Mass., 125 Mass. 548.

[34] W. U. Tel. Co. *v.* Ala., 132 U. S. 472; W. U. Tel. Co. *v.* Charleston, 163 U. S. 711.

[35] W. U. Tel. Co. *v.* Atl., etc., Co., 5 Nev. 103.

[36] Gibbons *v.* Ogden, 9 Wheat. 205.

[37] Cumb. T. & T. Co. *v.* Un. El. Ry., 42 Fed. Rep. 273; Wis. Tel. Co. *v.* Oshkosh, 62 Wis. 32; C. & P. Tel. Co. *v.* B. & O. Tel. Co., 62 Ind. 410.

[38] Rev. Stats. U. S., par. 5263.

[39] 96 U. S. 1.

without compensation[40] and, although all railroads are post roads,[41] a telegraph company is given no right to occupy the right of way of a railroad, with its lines, without the consent of the railroad company.[42] On the other hand, the railroad company may not make an exclusive contract of this nature[43] and a telegraph company may acquire right of way over a railroad, without the consent of the latter, by due process of law.[44]

The question of state taxation of companies accepting the benefits of the Act of 1866 has given rise to a multitude of decisions. There can be no doubt as to the right of the state to impose taxes upon business carried on wholly within its jurisdiction,[45] but a specific tax upon each message transmitted beyond the state is unconstitutional,[46] and a tax upon the franchise of such a company is void;[47] nor may a state impose a tax upon messages partly within the state.[48] Strong, J., in the case of the *Railroad* v. *Penniston,*[49] discussing the question of state taxation of federal agencies, says: "It is, therefore, manifest that the exemption of federal agencies from taxation is dependent, not upon the nature of the agent or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or does it hinder the efficient exercise of their power." An opinion that states clearly and briefly the true rule by which state taxation of companies operating under the "Telegraph Act," must be measured.

[40] St. Louis *v.* W. U. Tel. Co., 148 U. S. 92.

[41] Rev. Stats. U. S., Sec. 3964.

[42] W. U. Tel. Co. *v.* Ann Arbor R. R. Co., 90 Fed. Rep. 379.

[43] W. U. Tel. Co. *v.* B. & O. Tel. Co., 19 Fed. Rep. 660; Postal Teleg. Co. *v.* W. U. Teleg. Co., 50 Fed. Rep. 493.

[44] Mercantile Trust Co. *v.* A. & P. Ry. Co., 63 Fed. Rep. 513; Postal Tel. Co. *v.* Southern Ry. Co., 89 Fed. Rep. 190; Postal Tel. Co. *v.* Clev. Ry. Co., 94 Fed. Rep. 234.

[46] Ratterman *v.* W. U. Tel. Co., 127 U. S. 411.

[46] Teleg. Co. *v.* Tex., 105 U. S. 460.

[47] San Francisco *v.* W. U. Tel. Co., 31 Pac. Rep. 10.

[48] *In re* Penn. Tel. Co. (N. J.), 20 Atl. Rep. 846.

[49] 58 Wall. 5.

Telegraph companies enjoying the privileges of the Act of July 24, 1866, do so, in subordination to the due exercise of the police power of the state in which their lines are situated;[50] the rights so given are permissive only and properly subject to all state and local legislation regulating their exercise. So a municipality, under the exercise of its police power, may enact and enforce ordinances intended to promote the safety and convenience of the public in its use of the streets;[51] but where such regulations and restrictions are excessive, or evidence a desire to oppress, control or defeat the company's existence, they are void.[52] It is not the intention of the act of July 24, 1866, to do more than exercise a proper control of a business, whose very nature makes its operations interstate commerce, but neither state nor municipality may enact laws that hinder the exercise of the powers, the enjoyment of the privileges Congress has so conferred upon electrical companies of this nature. Nevertheless, a proper interpretation of the law demands that telephone and telegraph companies, operating under the act, be subject to legislation that is simply the due exercise of the police powers of the state or municipality.

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[50] Richmond *v.* Bell Tel. & Tel. Co., 174 U. S. 761.
[51] Mich. Tel. Co. *v.* Charlotte, 93 Fed. Rep. 11.
[52] Richmond *v.* So. Bell Tel. & Tel. Co., 174 U. S. 761.